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Law Letter

In this issue

Probationary Employment Matters

In the employment context, the term "probation" is relatively well-understood as a trial period during which an employee is evaluated by an employer to determine his or her suitability for a job. Despite a common understanding of what probation is, there are several nuances in the law around probationary periods that make it a more complex issue than it appears to be on its face. This article considers the nature of probationary employment and explores some of the common pitfalls that can arise in relation to probationary periods. It also discusses some best practices for local government employers to ensure that the risk of wrongful dismissal claims arising out of probationary periods is minimized.

The Nature of Probation

The term "probation" is not defined in the *Employment Standards Act*, which otherwise sets out the minimum standards that apply to most employment relationships and workplaces in British Columbia. Rather, probation is a creature of the common law, generally understood to be a trial period of employment during which an employee is evaluated in a number of respects to determine his or her suitability for a job. As stated by the trial judge in *Jadot v. Concert Industries Ltd.,* the purpose of a probationary period is not simply a time to consider the technical skills of a potential permanent employee. It is also an opportunity for the employer to assess the character of the applicant and determine if the

employer will work in harmony with an organization if hired permanently.

A probationary period only arises within an employment relationship where it has been agreed to by an employer and employee by contract. However, given that probation has a recognized meaning in employment law, a contract doesn't necessarily have to define "probationary period" in order for it to be effective or enforceable. Claims by employees that they did not understand what "probation" meant will often fail on this basis.

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For example, in *Mayberry v. Hampton Golf Club Ltd.*, the plaintiff was hired on a 2-year contract to be the General Manager for the defendant golf club. A clause in the contract specifically deemed the first year to be a "probationary period". In light of its dissatisfaction with the plaintiff's performance over the first eleven months of the contract, including his difficulties communicating with other employees, the employer gave written notice to the plaintiff that it was not extending his contract beyond the probationary period. The plaintiff brought a claim for wrongful dismissal on the basis that the golf club fired him prior to the end of the two-year contract.

The judge noted that because "probationary period" was not defined, it was necessary to examine the circumstances that led to its inclusion to see if they revealed the intent of the parties. The plaintiff testified that he had agreed to the probationary term without any discussion. He understood that it meant that if he did a good job and stayed out of trouble and acted as a professional, he would be suitable to continue into the second year of the contract. He also acknowledged on cross-examination that the probationary period meant that if he did not do a good job he would not be retained for the second year. The judge concluded that while the contract did not elaborate on what the parties meant by the term 'probationary period', the evidence made their true intention as to its meaning clear and unambiguous. That is, during the first year of the contract, the golf club would test the employee's abilities and suitability as the general manager. If he could prove during the probationary period that he was suitable for the job, he would continue into the second year of the contract. If he did not, he would not be retained. Accordingly, the judge found that the term of the contract was a one-year contract with a provision for the employer to extend it for a second year on the terms set out therein.

In *Nagribianko v. Select Wine Merchants Ltd.,* the employer appealed a lower court's finding that the probationary period contained in an employment contract was unenforceable because the meaning of "probation" was not clear on the face of the

contract. The employee had given evidence at trial that his understanding of the term "probation" was that if he performed well, his employment would continue after the probationary period ended. The employee had also acknowledged during cross-examination that he had been subject to probation periods in previous jobs and that he generally understood what a probation period meant. The Divisional Court concluded that the trial judge had erred in law in failing to recognize that contractual interpretation is an objective exercise. It continued:

> A reasonable person in the same circumstances as the Respondent/Plaintiff would have understood the term "probation" to mean a period of tentative employment during which [the Employer] would determine whether the Respondent/Plaintiff would be a suitable employee and would decide whether or not to make him a regular/non probationary employee…On his own evidence, the Plaintiff /Respondent understood that during the 6 month probationary period he would be at risk. He may have believed that the employer would find him to be a suitable employee, but a reasonable person in those circumstances would also have understood that that might not happen.

Ultimately, the probationary period was upheld as valid and the employee was found to have been properly terminated within it.

Good Faith Assessment of Suitability

Assuming that an employment agreement properly imposes a period of probation, the question arises as to how an employer can properly terminate an employee during that period if the employer determines that the employee is not suitable for the position.

An oft-cited decision in this context is *Ritchie v. Intercontinental Packers Ltd.,* ("*Ritchie*"). In that case, the judge described the restrictions on the exercise of an employer's discretion in the

dismissal of a probationary employee as follows:

> … Thus where such an employee is fired, it seems to me that the only onus that rests on an employer to justify the dismissal, is that he show the court that he acted fairly and with reasonable diligence in determining whether or not the proposed employee is suitable in the job for which he was being tested. So long as the probationary employee is given a reasonable

> opportunity to demonstrate his ability to meet the standards the employer sets out when he is hired, including not only a testing of his skills, but also his ability to work in harmony with others, his potential usefulness to the employer in the future, and such other factors as the employer deems essential to the viable performance of the position, then he has no complaint. As for the employer, he cannot be held liable if his assessment of the probationary employee's suitability for the job is based on such criteria and a fair and reasonable determination of the question. In my opinion the law does not require the employer to do anything more.

In British Columbia, the leading case on probationary employment is *Jadot v. Concert Industries Ltd*. In that case, the Court of Appeal denied an employee's appeal from a finding that she had been properly dismissed as unsuitable during her period of employment. The Court affirmed the trial judge's finding that an employer, during a probationary period, "has the implied contractual right to dismiss a probationary employee without notice and without giving reasons provided the employer acts in good faith in the assessment of a probationary employee's suitability for the permanent position".

In the *Nagribianko* case, after citing the test laid out in *Jadot,* the Court added a comment that echoes the *Ritchie* decision, stating: "[w]here the employment of a probationary employee has been terminated for unsuitability, the employer's judgment and discretion in the matter cannot be questioned. All that is required is that the employer show that it acted fairly in determining whether the probationary employee was suitable and that he/she was given a fair opportunity to demonstrate his/her ability"

The 'test' articulated in the *Jadot* case has been cited in several jurisdictions in Canada and remains the enunciated standard in British Columbia.

The facts of the *Jadot* case also provide a helpful example of what a "good faith assessment of suitability" looks like. The employer in *Jadot* was a small public company which produced and marketed air-laid woven paper products. It was looking for someone to manage its Vancouver office and be the corporate secretary. The plaintiff was hired to manage the employer's Vancouver office and be the corporate secretary, though the employer made clear to her that she would be expected to "work as a team" and "wear different hats". Prior to commencing full-time employment, Ms. Jadot agreed that she would be subject to a 6-month probationary period.

Problems soon arose in relation to the employment relationship. At trial, the judge described the problems as relating to Ms. Jadot's personality, personal management style and business approach. Tension arose between Ms. Jadot and a junior secretary in the office as well as between Ms. Jadot and the company's corporate solicitor and several other employees. The vice-president also indicated that he found Ms. Jadot condescending and abrasive and not open in her approach to employees, particularly people to whom she did not report. On the basis of these complaints and his own inquiries, the president of the company concluded that Ms. Jadot did not fit in with the team or with the team approach of the employer. He advised Ms. Jadot, half way through her probationary period, that a long-term arrangement would not work and that her employment was terminated.

The trial judge noted that the question of whether the plaintiff would fit in was a very important one

for the employer and a factor that had been made clear to the plaintiff. He noted that the president and vice president had interviewed other employees to ascertain their views when it appeared that Ms. Jadot might not fit into the organization. He concluded that the inquiries were made promptly by the president after being alerted to some difficulties and that the employer had shown that it acted bona fide and concluded honestly that Ms. Jadot would not be able to work harmoniously in the organization. The employer had also demonstrated that it did not have an improper motive in terminating Ms. Jadot's employment. Although the president had not apprised Ms. Jadot of his concerns or given her an opportunity to respond, it was not bad faith not to do so. The judge ultimately ruled that the evidence supported a conclusion that the defendant employer had taken reasonable steps and reached an opinion in good faith that the plaintiff was not compatible with the organization. This finding was upheld on appeal.

The *Ritchie* case is also helpful. In that case, the plaintiff had been hired as the Manager of Human Resources Services in the defendant's meat plant. In addition to the usual tasks associated with such a role, the employer had also asked the employee to seek ways and means of improving the morale of employees at the plant. It was common ground that the plaintiff would initially be subject to a 6-month probationary period. Towards the end of the 6-month probationary period, the employer called the plaintiff and advised him that his job was being terminated. He was not told his performance was unsatisfactory, but that the defendant was changing its organizational set-up and his job would be eliminated. However, the real reason was that the employer had concluded the plaintiff was not suitable to carry out the functions of the position. The plaintiff sued for wrongful dismissal, arguing that he was entitled to reasonable notice of termination despite his clear knowledge that he was on probation. (The issue of notice entitlements during a probationary period will be discussed subsequently).

The judge accepted the employer's evidence that it had received numerous complaints about the plaintiff's manner, including that he was arrogant, hard to deal with and not inclined to listen to other persons' points of view. The manager of the employer's plant testified that he had tried to get the plaintiff to listen more carefully to the complaints he received, but to no avail. The employer was also disappointed that the plaintiff had clearly been unable to come up with any ways to boost employee morale and job enrichment. The judge concluded that the employer had acted in a fair and reasonable manner in making its assessment that the plaintiff's attitude did not make him a suitable Human Resources Manager, notwithstanding the specious reason he had given the plaintiff when he fired him. As a result, the plaintiff's claim was dismissed.

Conveying Expectations During Probation

It is clear that the grounds on which suitability can be assessed are wide-ranging and include not only an employee's skills and abilities but also an individual's personality and 'fit' within an organization. There is law that discusses the need of an employer to communicate to the employee the specific expectations it has where it relies on the breach of those expectations as justification for dismissal during a period of probation. For example, in *Geller v. Sable Resources*, the court stated as follows:

> In my view the key to the analysis, applied to the facts of the present case, is embedded in the concept that a probationary employee must be given an opportunity to demonstrate his ability to meet the standard the employer set out when he was hired. Here, the

> plaintiff failed to live up to an expectation about pitching in on his time off that was never discussed with him. The parties were not at all *ad idem* as to their roles relative to the apprenticeship or the degree of supervision available or required. It was evident in the last series of emails that the plaintiff had no real sense of the defendant's expectations. It was not, however, a breach of the employment contract for the plaintiff to take his scheduled days off.

The dismissal in *Gellar* came about as a result of a misunderstanding by the employer of the employee's qualifications. The employee, an apprentice auto mechanic, had been hired and sent straight to work under the supervision of a heavy duty mechanic. Three weeks later the employee refused to work without supervision—given that he was only an apprentice—and was let go for that refusal. This was in the context of, as Justice McEwan found, the fact that the employer "put [the employee] to work with almost no investigation or discussion about what was expected of him." In that context, and with that expressed reason for dismissal, the employer was found not to have given the employee a reasonable opportunity to demonstrate his suitability.

More recently, in *Luhowy v. Nunavut*, a judge of the Nunavut Court of Justice explained the scope of the obligations to communicate expectations prior to the hire of an employee as follows:

> Probationary employees are in a substantially different situation than employees under contract or those employed in permanent positions. While employers are under a duty to act fairly and in good faith, they clearly have the right to reject those employees who fail to perform their duties satisfactorily. Provided there is no evidence of bad faith or unreasonableness, there is no burden on an employer to specify every particular issue or incident of failure. It is sufficient that the broad parameters within which the rejected employee was found unsuitable are capable of articulation…It is also unnecessary, subject to the over-riding requirements of good faith and reasonableness, for contracts of employment to lay out in detail every particular issue which may result in rejection. The Plaintiff's assertion that the contract of employment, by failing to specifically list "unsuitability" as a ground of rejection, was deficient fails for this reason.

Generally speaking, while an employer does not have to specifically enumerate every expectation it has of an employee at the start of the probationary period – particularly those which are comprised in a job description or are otherwise common-sense, it is advisable to highlight expectations that might not reasonably be understood by an employee or that might be unique to a particular workplace.

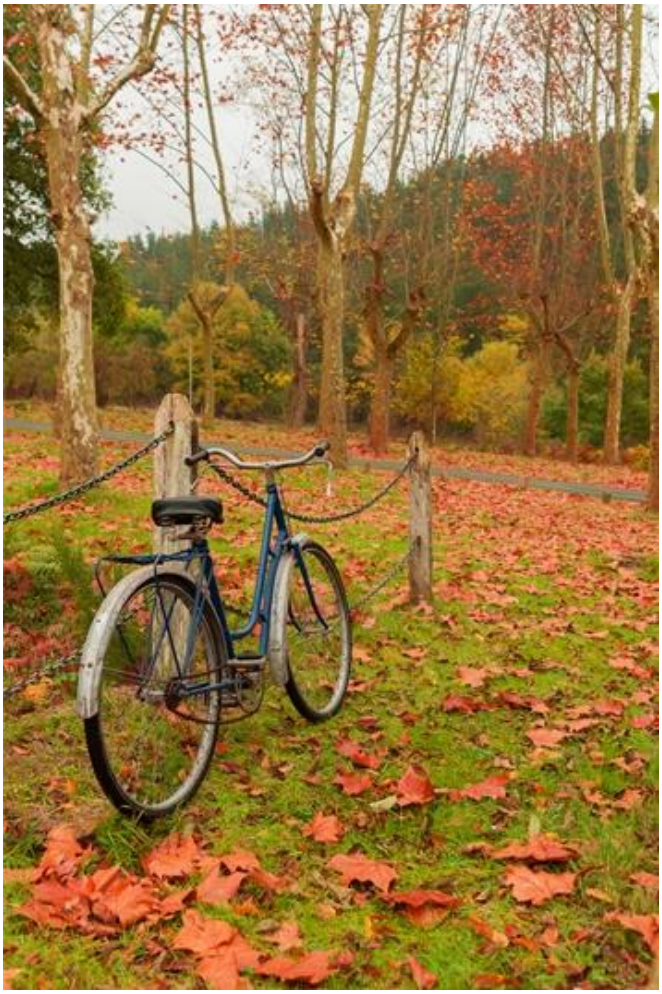
In the Winter 2017 *Law Letter*, Part 2 will deal with Notice During the Probationary Period, Statutory Officers on Probation and Probation as a Form of Constructive Dismissal.

Marisa Cruickshank

The BC Water Sustainability Act and Local Governments

Introduction

The *Water Sustainability Act,* SBC 2014, c. 15*,* (the "***WSA***") came into effect in British Columbia on February 29, 2016 following a process that began in 2009. The ***WSA*** replaces the former *Water Act* and introduces a number of changes to the way that water is managed in the province. Significant changes under the *WSA* include licensing groundwater for non-domestic use, the



implementation of new fees and rentals for water use, stronger protection for aquatic ecosystems, expanding protection of groundwater related to well construction and maintenance and increasing dam safety and awareness. Among other things, the *WSA* also repealed the *Fish Protection Act* with the provisions of that statute now included in the *WSA* or the new *Riparian Areas Protection Act*.

Much of the detail related to implementation of the *WSA* is, or will be, provided in regulations and operational policies with an initial set of regulations that came into effect on February 29, 2016. In general, the new *WSA* regulations maintain many elements of the historic *Water Act* regulations while updating legal language, Including section references and terminology aligned with the *WSA*. The *WSA* regulations also revise some historic policies and introduce some new policies authorized by the *WSA*, including groundwater licensing. Regulations presently enacted under the *WSA* consist of the *Water Sustainability Regulation*, *Groundwater Protection Regulation*, *Water Districts Regulation*, *Dam Safety Regulation*, and *Water Sustainability Fees, Rentals and Charges Tariff Regulation*.

With the initial set of regulations now in effect, the government has announced that it will be begin work on other policies and regulatory components required to fully implement the *WSA*, including those related to water objectives (section 43 of the *WSA*), water sustainability plans (sections 64-85 of the *WSA*), measuring and reporting, livestock watering, designating areas, dedicated agricultural water and alternative governance approaches.

Key Provisions of the new Act

<u>Water vested in the Province</u>

Under section 5 of the *WSA*, the property and right to use of all surface and groundwater is vested in the province, except insofar as private rights have been established. Subsection 5(1) of the *WSA* vests the property in and the right to the use and flow of all the water at any time in a

"stream" in British Columbia with the province. The term "**stream**" is defined in section 1 of the *WSA* as "a natural watercourse, including a natural glacier course, or a natural body of water, whether or not the stream channel of the stream has been modified, or a natural source of water supply, including, without limitation, a lake, pond, river, creek, spring, ravine, gulch, wetland or glacier, whether or not usually containing water, including ice, but does not include an aquifer". Likewise, under subsection 5(2), the property in and the right to the use, percolation and flow of groundwater, are for all purposes vested in the province, except insofar as private rights have been established under authorizations, or deemed under section 22 (8) [precedence of rights]. The term "**groundwater**" is defined in section 1 of the *WSA* as "water naturally occurring below the surface of the ground".

Authorizations for water use purposes

Under subsection 6(1) of the *WSA*, a person must not divert water from a stream or an aquifer, or use water diverted from a stream or an aquifer by the person, unless the person holds an authorization authorizing the diversion or use, or the diversion or use is authorized under the regulations. An "**authorization**" is defined in section 1 of the *WSA* as licence or use approval issued in accordance with the *WSA*. Water diversion is permitted for the limited purposes of subsection 6(2) for purposes of extinguishing a fire or for testing the quality or quantity of water or to conduct a flow test or for domestic purposes or prospecting under subsections (3) and (4). Under subsection 7(1) of the *WSA*, a licence entitles its holder to divert and beneficially use the quantity of water specified in the licence, to construct, maintain and operate the works authorized by the licence and related works necessarily required for the proper diversion or use of the water or the power produced from the water, to make changes in and about a stream necessary for the construction, maintenance or operation of works or to otherwise facilitate the authorized diversion, or to construct fences, screens and fish or game guards across streams for the purpose of conserving fish or wildlife. Under subsection 7(2), a use approval entitles its holder to do anything described in subsection (1) for the period or at the times and in the manner specified in the use approval.

Under section 9 of the *WSA*, conditional and final licences are issued by the comptroller or a water manager to municipalities and regional districts for the purpose of authorizing the diversion or use of water for one or more water use purposes following the application procedure detailed in section 12. A licence issued under section 9 may be either a conditional licence that authorizes the licensee to construct works, or divert and use water, before the issue of a final licence or a final licence that that authorizes the diversion and use of water but does not authorize the construction of works. The term "**water use purposes**" is defined in section 2 of the *WSA* and includes conservation purposes, domestic purposes, industrial purposes, irrigation purposes, land improvement purposes, mineralized water purposes, mining purposes, oil and gas purposes, power purposes, storage purposes and waterworks purposes. Each of those purposes is further defined in section 2.

Under section 10 of the *WSA*, the comptroller or a water manager may issue an approval for one or more water use purposes authorizing a person to divert or use water from a stream or an aquifer for a term not exceeding 24 months. As well, under section 11 of the *WSA*, the comptroller, a water manager or an engineer may issue an approval authorizing the province or another person to make changes in and about a stream in accordance with the terms of the approval.

Expropriation

Under section 32 of the *WSA*, a licensee has the right to expropriate any land reasonably required for the construction, maintenance, improvement

or operation of works authorized or necessarily required under the licence. In addition to the right under subsection (1), the holder of a licence that authorizes the diversion of water for domestic purpose or a waterworks purpose has the right to expropriate any land the control of which by the licensee would help prevent pollution of the water authorized to be diverted. Furthermore, under subsection (3), with the consent of the Lieutenant Governor in Council, the holder of a licence that authorizes the construction or use of a dam has the right to expropriate any land that has been flooded by construction of the dam or that would be flooded if the dam were constructed and utilized to the maximum height authorized.

Municipalities may also expropriate water licences under subsection 31(2) of the *Charter* and regional districts are granted the same right under subsection 289(2) of the *LGA*. Under section 42 of the *WSA*, if a licence is acquired by a regional district or municipality, the comptroller may issue a new licence in place of the acquired licence having the same precedence but authorizing the diversion or use of water for any water use purpose required by the regional district or municipality, as applicable.

Specified Water Objectives and Planning

Under section 43 of the *WSA*, the Lieutenant Governor in Council may make regulations for the purposes of sustaining water quantity, water quality and aquatic ecosystems in British Columbia. Under subsection 43(2)(a), a regulation under section 43 may require that a water objective be considered by a "public officer" making a specified decision under a specified enactment, if the decision is in relation to the watershed, stream, aquifer or other area or environmental feature or matter for which the water objective was prescribed. The term "**public officer**" is defined in section 1 of the *WSA* to include any person, other than a judicial officer, who, under an enactment, has authority to make a decision affecting the rights of another person.

Under subsection 43(5)(a), a regulation may also require that a regional district to consider specified water objectives when developing, amending or adopting a regional growth strategy under Part 13 [Regional Growth Strategies] of the *LGA*. Similarly, under subsection 43(5)(b), a regulation may require that a municipality consider specified water objectives when developing, amending or adopting an official community plan under Part 14 [Planning and Land Use Management] of the *Local Government Act* or in the case of the City of Vancouver, Part XXVII [Planning and Development] of the *Vancouver Charter*. The "**water objectives**" are established in the regulations for watersheds, streams, aquifers or other specified areas or environmental features or matters in order to sustain water quality and quantity required for specified uses of water and required to sustain aquatic ecosystems.

Water Sustainability Plans

Under subsection 65(1) of the *WSA*, the provincial minister may, on request or on the minister's own initiative, by order, designate an area for the purpose of the development of a water sustainability plan if the minister considers that a plan for the area will assist in preventing or addressing conflicts between water users, conflicts between the needs of water users and environmental flow needs, risks to water quality, risks to aquatic ecosystem health, identifying restoration measures in relation to a damaged aquatic ecosystem, or in other prescribed circumstances. Under section 66 of the *WSA*, the minister may also, by order, establish the process by which a proposed water sustainability plan for a plan area is to be developed. The order may also designate the government or another person as the person responsible for preparing the proposed plan (defined as the "**responsible person**"),

establish the terms of reference for the plan and establish one or more technical advisory committees in relation to development of the plan. Under section 67 of the *WSA*, the minister may also, by order, limit the issues to be considered in a water sustainability plan development process, or the recommendations that may be made in the plan for measures to address the issues considered. Under subsection 68(1) of the *WSA*, the terms of reference for a proposed water sustainability plan must include the following:

> (a) the purpose of the proposed plan;
>
> (b) the scope of the proposed plan;
>
> (c) the issues to be addressed in the proposed plan;
>
> (d) a description of the organizational structure supporting the development of the proposed plan, which structure must meet any prescribed minimum requirements;
>
> (e) an estimate of the financial, human and other resources required for the plan development process and a description of the funding commitments and committed sources of other resources identified in the estimate;
>
> (f) a process for public and stakeholder communications and consultations, which process must meet any prescribed minimum requirements;
>
> (g) if the responsible person is a person other than the government, a process for consultations with the government throughout the plan development process;
>
> (h) a time limit for completing the proposed plan; and
>
> (i) any other prescribed information.

Under section 69 of the *WSA*, consideration may be given to the results of other Provincial government, local authority and first nation government strategic, operational and land or water use planning processes in relation to land or water within or adjacent to the plan area. The term "local authority" is defined in section 64 as the council of a municipality or the board of a regional district. Under subsection 69(3), proposed plans may also be prepared in conjunction with the preparation of a proposed drinking water protection plan under the *Drinking Water Protection Act*, or a land use or water use plan prepared under the *LGA* or another prescribed enactment. Under section 70 of the *WSA*, the responsible person is also required to notify any party whose rights may be detrimentally affected if the recommendations of the plan are implemented.

The content of water sustainability plans are mandated in section 73 of the *WSA* and under section 74, plans may be submitted to the minister to be dealt with by the minister in accordance with that section. If a proposed water sustainability plan submitted to the minister under section 74 does not contain a recommendation that a regulation or order under the *WSA* or another Act be made in relation to the plan, the minister may accept all or part of the proposed plan as a water sustainability plan. If a proposed water sustainability plan submitted to the minister under section 74 contains a recommendation that a regulation or order under the *WSA* or another Act be made in relation to the plan, the minister may place the proposed plan, supporting information and the minister's comments and recommendations before the Lieutenant Governor in Council in accordance with section 75 of the *WSA* and the Lieutenant Governor in Council may then, by regulation, accept all or part of the plan.

The Lieutenant Governor in Council is given specific regulatory authority to enact regulations in sections 76 through 83 of the *WSA* that may

direct affect local governments or public officers within local governments. Under subsection 76(2) of the *WSA*, the Lieutenant Governor in council may also, by regulation, require that a water sustainability plan be considered by a public officer making a specified decision under a specified enactment. The regulation may also require, restrict or prohibit the issuance of specified land or resource instruments by a public officer or of powers exercised by the public officer under a specified enactment. For purposes of a water sustainability plan, the Lieutenant Governor in council may also restrict or prohibit the issuance of an approval of a plan requiring the approval of an approving officer under a specified enactment.

Under section 78, the Lieutenant Governor in Council may, by regulation, restrict or prohibit a specified use of land or natural resources in relation to all of part of the plan area. Likewise, under section 79 of the *WSA*, the Lieutenant Governor in Council, by regulation may direct the comptroller or a water manager to amend the terms and conditions of licences, regardless of the precedence of the rights under those licences, or cancel licences identified in the regulation.

In relation to water sustainability plans, the Lieutenant Governor in Council may also under section 80 of the *WSA*, by regulation direct the comptroller or a water manager to amend the terms and conditions of a licence to require the licensee to reduce or alter the diversion of water under the licence and to construct alter, install, replace, repair, maintain, improve, seal, deactivate, decommission or remove works, to adopt more efficient practices or to make other changes to works or operations of the licensee in relation to the licence, as set out in the regulation. Under section 81 of the *WSA*, the Lieutenant Governor in Council, by regulation, may also require that local authority strategic or operational planning processes give consideration to a specified part or all of the plan.

Enforcement Powers under the *WSA*

Under section 89 of the *WSA*, an employee or officer of a municipality or regional district may enter onto any land or premises for the purpose of exercising powers or performing duties under *WSA* or another enactment. These powers are in addition to those granted to municipalities under section 16 of the *Charter* and regional districts under section 291 of the *LGA*. Authority to enter a private dwelling under section 89 of the *WSA* is prohibited unless the consent of the occupant is obtained or a warrant issued under the *WSA* or section 275 of the *Charter*. A person authorized to enter onto land or premises may also call on the assistance of a peace officer under subsection 89(3) of the *WSA*.

The *WSA* Regulations

There are presently five regulations in effect under the *WSA* consisting of the *Water Sustainability Regulation*, *Groundwater Protection Regulation*, *Water Districts Regulation*, *Dam Safety Regulation*, and *Water Sustainability Fees, Rentals and Charges Tariff Regulation*.

Water Sustainability Regulation

Among other things, the *Water Sustainability Regulation* does the following:

- prescribes the application requirements for licences and use approvals;
- designates sensitive streams;
- prescribes the process for expropriation under the *WSA*;
- exempts certain works from the application of section 6(1) of the *WSA*;
- authorizes changes in or about a stream without an authorization in certain prescribed circumstances; and

- prescribes circumstances for short-term diversion or use of water for well drilling purposes without use approval,

Under section 32 of the *Water Sustainability Regulation*, local governments are exempted from holding an authorization in respect of drainage works belonging to or used by the local government to drain surface runoff, or to divert water from an aquifer to lower the water table, or to prevent a nuisance provided there is no use of the water for a water use purpose between the time the water enters the drainage works and the time that water is discharged from the drainage works, and the water is discharged without causing a significant risk of harm to public safety, the environment, land or other property. As well, section 39 of the *Water Sustainability Regulation* includes some deemed authorized changes to streams that are relevant to local governments. These include the mechanical or manual control of Eurasian watermilfoil and other invasive species of aquatic vegetation by a municipality, a regional district or the Greater Vancouver Water District under subsection 39(1)(m), the construction or placement of erosion protection works or flood protection works during an emergency declared under the *Emergency Program Act* that involves flooding by a municipality or a regional district, or an agent of any of them, under subsection 39(1)(o) and the clearing of an obstruction from a bridge or culvert by a municipality or a regional district during a flood, if the obstruction is causing or has the potential to cause a significant risk of harm to public safety, the environment, land or other property under subsection 39(1)(p). Finally, a change in and about a stream to which a standard or regulation under the *Forest and Range Practices Act* applies by a municipality or regional district is also deemed an authorized change to a stream under subsection 39(2) of the *Water Sustainability Regulation*.

Dam Safety Regulation

The *Dam Safety Regulation* provides a classification scheme for dams with respect to dam failure consequences and prescribes general safety requirements, including prescribed activities, monitoring, record keeping and reporting. Under the *Dam Safety Regulation*, a "**local emergency authority**" is defined in subsection 1(2) of the regulation as a local authority that has jurisdiction of any land that is in the immediate vicinity of the dam or the reservoir of the dam, or is downstream or downslope of the dam and may be adversely affected by a complete or partial collapse of the dam, or an uncontrolled release of all or part of the water impounded by the dam. Under section 40 of the *Interpretation Act* and the Schedule to the *Charter*, a "local authority" includes municipalities and regional districts and as such, the definition of local emergency authority in the *Dam Safety Regulation* applies to local governments.

Under section 9 of the *Dam Safety Regulation*, an owner of a dam with a significant, high, very high or extreme classification must prepare a dam emergency plan and, promptly after a plan is prepared and accepted by a dam safety officer, deliver a copy of the record to each local emergency authority for the dam. Section 33 of the regulation also provides that if immediately before February 29, 2016, there was under the former regulation an emergency preparedness plan for a dam, the owner of the dam must review and, if necessary, revise the plan to ensure that it contains the record described in section 9 and deliver a copy of the record to each local emergency authority on or before March 31, 2017. Under section 10, the owner of a dam with a low classification must prepare a record, in the form and with the content specified by the comptroller or a water manager, that sets out the name and contact information of the person who is the emergency contact for the dam and deliver a copy of the record to each local emergency authority

for the dam. Under section 28 of the regulation, an owner of a dam commits an offence if it does not comply with these regulations.

Other *WSA* Regulations

The *Water Sustainability Fees, Rentals and Charges Tariff Regulation* and *Water Districts Regulation* provide details for the administration of the *WSA*. The *Water Districts Regulation* divides the province into water districts detailed in the regulation while the *Water Sustainability Fees, Rentals and Charges Tariff Regulation* prescribes applicable fees, rentals and charges under the *WSA*. Under the *Water Sustainability Fees, Rentals and Charges Tariff Regulation*, municipalities and regional districts are defined as "**local providers**". Applicable rates are prescribed for licence fees for local providers in section 4 and for rental fees for irrigation purposes and waterworks purposes in section 5.

The *Groundwater Protection Regulation* prescribes standards for the registration and qualification of well drillers and well pump installers as well as their activities in relation to wells. The regulation also prescribes requirements for well construction, operation, maintenance and decommissioning. The regulation applies generally and there are no specific provisions in relation to local governments.

Lindsay Parcells

The Law of Dealing with Homelessness

The general rule is where there is a lack of accessible shelter spaces compared to the number of homeless people, a local government cannot prohibit homeless people from setting up temporary shelter overnight in all areas: *Victoria City v. Adams*, 2009 BCCA 563, re-affirmed in *Abbotsford v. Shantz*, 2015 BCSC 1909. The courts have recognized that people who do not own property or have access to private property have a constitutional right to shelter themselves in public parks overnight where there is no viable alternative indoor shelter option. There is no constitutional right to set up shelter and sleep in parks during the day: *Johnston v. Victoria (City)* 2011 BCCA 400.

Many local governments have parks bylaws that prohibit overnight camping in all areas. As most local governments do not have an adequate number of accessible shelter spaces to house their homeless population, they should be wary of enforcing a bylaw that says that no overnight camping is allowed anywhere. This is because a bylaw that bans overnight camping in all areas is unconstitutional where there are not enough accessible shelter beds.

Even where a local government has a numerically sufficient number of shelter beds to house its homeless population, the courts also look at the nature of those shelters. For example, if the shelter requires rent payments or imposes strict conditions on the length of a person's stay, then the shelter may not be accessible or available to every person who is homeless. The case law suggest that a local government cannot prohibit temporary overnight shelters in parks unless it has adequate services, infrastructure such as toilets, low to no barrier shelter options, and permanent housing in place to shelter the homeless. The *British Columbia v. Adamson* 2016 BCSC 584 decision suggests that adequate services includes having a no-barrier shelter (which may include allowing people to use the drug of their choice[1]), a permanent place in which homeless people may reside, and a location in which homeless people may safely and securely store their belongings during the day.

The right to allow homeless people to shelter themselves where there is no viable shelter alternative is not unrestricted. Local governments may impose reasonable limits by prohibiting temporary shelter and obstructions on highways, sidewalks, public squares, sports fields, and playgrounds, and may restrict areas within parks, entirely restrict certain parks altogether, or implement a rotating system amongst certain parks.[2] The local government should ensure that there is adequate space within the unrestricted areas for homeless persons to be able to set up a temporary shelter, rest, stay warm, and attend to personal hygiene, and the locations should be reasonably located near services for the homeless. For example, if the local government only allows overnight camping in a remote park that is a 45 minute drive away from the town centre and access to services, this would not likely be seen as reasonable.

It is recommended that local governments with a lack of accessible shelter space to house their homeless population ensure their bylaws comply with the constitutional case law, and proactively allow temporary overnight camping in suitable areas.

Carrie Moffatt

Liability for Streets, Sidewalks, Buildings and Other Facilities

Legal rights and obligations are frequently expressed in terms of duties. When one private agent breaches a duty owed to another private agent, the injured party is entitled to compensation for resulting losses. Difficulties arise in applying this concept to public bodies like municipalities. Local governments are not just legal persons – they are also bodies with legislative powers. In addition, they must serve the interests of the public at large, and cannot just protect the private rights of any particular group of citizens.

The law developed several means to respect these differences, and to keep the exposure of public bodies within sensible limits. The courts have held that certain types of duties are owed only to the public at large, and do not trigger any private right of compensation. Another means is to exclude liability for acts of a legislative nature. A local government has no duty to any private agent to exercise its legislative powers to protect the economic interests of that private agent.

Finally, the legislature has also added provisions in the *Community Charter* and the *Local Government*

[1] Para 70.
[2] *Abbotsford v. Shantz*, 2015 BCSC 1909 at para 275

[12] *Canadian Aviation Regulations*, s. 101.01.
[13] Transport Canada, "Notice of Proposed Amendment – Unmanned Air Vehicles" (May 28, 2015) online: http://www.apps.tc.gc.ca/Saf-Sec-Sur/2/NPA-APM/actr.aspx?id=17&aType=1&lang=eng

Act which eliminate certain types of claims. Examples include section 744 of the *Local Government Act* [*nuisance liability*].

An early case applying these concepts to municipal roads was *City of Vancouver v. McPhalen,* a 1911 case that went to the Supreme Court of Canada. The plaintiff was injured on a city sidewalk which had fallen into disrepair. The *Vancouver Charter* (at that time) included the following provision:

> "… every such public street, road, square, land, bridge and highway **shall** be kept in repair by the corporation. (In this case, the sidewalk was treated as part of the highway, but modern cases take a different approach)."

The court held that this provision created a positive duty to keep the sidewalk in repair, and that this was a duty could be enforced by a private damages action.

The *Community Charter* gives municipalities the power to regulate highways, but does not contain the kind of mandatory duty considered in the *McPhalen* case. Accordingly, the courts have had to analyze these cases by considering other, more general, sources of legal duties. They are the common law general duty to be careful, and the *Occupier's Liability Act.*

In regard to the common law duty, one must take reasonable care to avoid acts or omissions which one can reasonably foresee would be likely to injure one's neighbour. As the court asked in the 1932 English decision in *Donoghue v Stevenson*, "Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in my contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

When it came to setting standards for people who control physical spaces (i.e. buildings, ice rinks – just about anything), the common law became a complicated tangle of rules and exceptions, so the legislature cleaned the problem up with simple statutory standard in the *Occupier's Liability Act:*

> **"3** (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.
>
> (2) The duty of care referred to in subsection (1) applies in relation to the
>
> (a) condition of the premises,
>
> (b) activities on the premises, or
>
> (c) conduct of third parties on the premises."

The Occupier's *Liability Act* does not apply to roads, but it does apply to sidewalks.

The Policy/Operation Distinction

Because of the concerns outlined above, courts in modern times have moved carefully in deciding the amount of civil responsibility that local governments can incur over the condition of roads and sidewalks.

- Courts have recognized the obvious concern that financial and other resources are limited.

- Courts do want to tell local governments how to spend their money, and what their priorities should be.

- On the other hand, the courts do not want to eliminate all responsibility for the condition of public roads, sidewalks or other works or facilities.

The landmark case came in England, *Anns v. Merton London Borough Council*. A number of houses in a subdivision were built with inadequate foundations. When the houses settled, the owners sued the builder and also the local government, for negligent inspection. The court summarized the general rule applicable to all legal entities (i.e. private or public):

> *"…the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise."*

The court then dealt with the argument that it was the local council which had the power to decide whether any building inspections would take place, and it would not make sense to impose liability if the council had the power to eliminate inspections altogether. This argument was rejected:

> "… quite apart from such consequences as may flow from an examination of the duties laid down by the particular statute, there may be room, once one is outside the area of legitimate discretion or policy, for a duty of care, at common law."

In *Knodell v. New Westminster*, a pedestrian slipped on a patch of ice on an overpass during an unusual cold spell in March. The accident took place around 7:30 in the morning. The City had followed its standard procedures, which were as follows: (1) City trucks had inspected the streets in the area between 4:00 a.m. and 6:00 a.m. However, the early morning inspections were restricted to streets – for budgetary restrictions sidewalks were not inspected unless there was a complaint. (2) Personnel in charge of inspecting sidewalks only came on duty between 7:30 a.m. and 8:00 a.m., too late to prevent this accident. The claim against the City was dismissed. The general principles governing the public policy exemption were stated as follows:

> "…the exemption may arise as a result of the nature of the decision made by the government agency - a government agency will be exempt from the imposition of a duty of care in situations which arise from its pure policy decisions. In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of

> authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. Further, it must be recalled that a policy decision is open to challenge on the basis that it is not made in the bona fide exercise of discretion. If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy decision-making is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered."

Then the court applied this reason to the conduct of New Westminster:

> "***Just*** and ***Brown*** deal with the dichotomy between true policy decisions, which are immune from review on traditional negligence principles, and operational decisions, which are not. It is a distinction that is often not easy to make…**In my opinion, the policy adopted by the City for the clearing of snow and ice from its sidewalks constitutes a *bona fide* exercise of its discretion based upon budgetary constraints and the availability of workers and equipment.** In my view, it is neither irrational, nor so unreasonable as to constitute an improper exercise of discretion. The City imposes on itself the same obligation that it imposes on persons whose property abuts sidewalks. It requires a response to snowfall by 10:00 a.m. of the day following a snowfall or freezing weather. The City does not have crews available to provide sidewalk maintenance outside of the dayshift hours, but does respond on an exceptional basis if a dangerous situation is brought to its attention."

Obviously the key issue is where the courts draw the line between policy decisions and operational decisions. The *Knodell* case was favourable to the municipality on that issue, but other cases have shown a more aggressive attitude in "second guessing" standards which governments create for themselves. In *Just v. British Columbia,* a car passenger on the Whistler Highway was injured when a rock fell from a steep bank and broke through the car window. The Province argued that the case against it could not succeed because it had established, and then met, its standard for inspections. The court disagreed:

> "Here what was challenged was the manner in which the inspections were carried out, their frequency or infrequency and how and when trees above the rock cut should have been inspected, and the manner in which the cutting and scaling operations should have been carried out. **In short, the public authority had settled on a plan which called upon it to inspect all slopes visually and then conduct further inspections of those slopes where the taking of additional safety measures was warranted. Those matters are all part and parcel of what Mason J.**

> **described as "the product of administrative direction, expert or professional opinion, technical standards or general standards of care". They were not decisions that could be designated as policy decisions.** Rather they were manifestations of the implementation of the policy decision to inspect and were operational in nature. As such, they were subject to review by the Court to determine whether the respondent had been negligent or had satisfied the appropriate standard of care."

This approach leaves much less discretion for the government body being sued.

The take away message is that for functions like inspection and clearing for roads and sidewalks.

- Establish procedures, and preferably base limitations on budgetary or financial constraints;
- Write the procedures down, and preferably have them approved by the council; and
- Follow them.

There is no guarantee that this will work (particularly with sidewalks, where some judges have occasionally imposed a higher standard of maintenance). But this will certainly maximize a local government's odds.

Limitations and Qualifications

The policy – operation distinction will not necessarily protect local governments in respect of other types of municipal facilities. As an example, in *Potozny v. Burnaby (City),* Burnaby set up an outdoor skating rink for the holiday season near one of its community centres. A skater was injured when she slipped on pine needles, which had accumulated on the ice. Burnaby was held liable under the *Occupiers Liability Act,* quoted above. As stated, the *Occupiers Liability Act* will apply to most types of municipal facilities.

Paul Hildebrand

Dispensary Society, 2016 BCSC 1566

This case involved a petition proceeding brought by the Corporation of Delta against the operator of a retail medical marijuana dispensary. Delta sought a permanent statutory injunction pursuant to section 274 of the *Community Charter* on the basis that the dispensary lacked a business licence and was operating in contravention of Delta's zoning bylaw.

The Society began operating in 2016 without a business licence. Although it later applied for a licence, its application was refused and the refusal was upheld by Delta's Council upon reconsideration. Section 7 of the petitioner's business licence bylaw referred to the requirement that a licence holder carry on business in a lawful manner, and the Society acknowledged that the operation of a medical marijuana retail dispensary was not permitted within the criminal law. Retail medical marijuana dispensary was also not a permitted use under the zoning bylaw.

The Court found that the respondent was clearly operating in violation of the business licence and zoning bylaws. The Court reviewed the case law regarding section 274, and noted that on proof of a breach of a bylaw the court has limited discretion to deny a statutory injunction to enforce the bylaw. In this case, there were no

extraordinary circumstances that would provide any basis for denying the statutory injunction. Although it was clear that the federal government would be making changes to the regulation of marijuana in the future, the court was required to enforce the law in its current form. As a result, the court issued the injunction.

In light of the Society's clear defiance of the bylaws, the Court also made an enforcement order. Courts are often reluctant to make enforcement orders until their orders are breached, necessitating an additional court application. As a result, this is helpful precedent for municipalities going forward.

The court also found that an award of special costs was appropriate in light of the Society's flagrant disregard of the bylaws. The Court found that such an award would send a message to other operations that may seek to operate outside the limits of the law.

***Kazemi v. North Vancouver (City)*, 2016 BCSC 1240**

The issue in this case was whether a personal injury claim by the plaintiff was statute barred pursuant to the notice requirements of the *Local Government Act*, in particular section 286 which requires notice to be given to a municipality within 2 months from the date on which the damage was sustained. The injury allegedly occurred on August 6, 2010 when the then 68-year old plaintiff allegedly fell on a portion of uneven sidewalk on Lonsdale Avenue. The plaintiff had immigrated to Canada in early 2010 from Iran and understood little English.

According to the evidence before the Court, the plaintiff retained legal counsel on November 29, 2010. The plaintiff's counsel wrote to the City on January 28, 2011 indicating that the plaintiff had tripped over "dangerously uneven portion of the sidewalk on Lonsdale Avenue, near the 14th Street

intersection in North Vancouver, BC." When the City responded on February 3, 2011, it stated that the plaintiff had failed to provide notice in compliance with section 286 and requested more specific information about the incident. The plaintiff began an action in the Provincial Court ten months after the alleged incident.

The Court reviewed section 286 as well as the case law regarding what constitutes a reasonable excuse under section 286(3). In previous cases, courts had held that the fact that English was not the first language of the plaintiff and the fact that the plaintiff had recently immigrated were relevant factors to consider. However, the Court

found that these factors are not determinative and that all of the circumstances must be observed. In this case, the evidence showed that the plaintiff had relied on her son to assist her with retaining legal counsel after the injury, but there was no explanation from him as to how he dealt with the matter. Although it appeared as though there was some delay in retaining a lawyer, there was also no evidence to explain the reason for the lawyer's delay in notifying the City once he was retained. The Court found that while each case is fact specific, the circumstances of the cases in which the court has previously found a reasonable excuse involved more compelling circumstances than in the instant case. Ultimately the court found that the plaintiff's claim was dismissed as statute barred.

***Compagna v. Nanaimo (City)*, 2016 BCSC 1045**

The petitioners owned a waterfront lot in Nanaimo with a steep slope facing the ocean. The lot was originally part of a larger property that was proposed for subdivision and development in 2002. At that time, the owners of the larger property entered into a covenant, agreeing not to build on the land except in accordance with the terms of the covenant. The covenant included a report prepared by a geotechnical engineer. While the report found that the site was geotechnically safe, the probability of geotechnical hazard on which the engineer based his opinion was the then current one in the *BC Building Code*, and his conclusion about safety and stability was subject to numerous recommendations being followed. Following registration of the covenant, the proposed subdivision was carried out and the petitioners became owners of the lot in question.

In 2014, the petitioners applied for a building permit from the City. The petitioners' representative indicated that they would not be obtaining any additional geotechnical report. The City identified a number of concerns with this. First, the 2003 report had been prepared to assist the approving officer in deciding if and how he might approve a subdivision of the larger lot into smaller lots and was not drafted for the purposes of a building permit application. Second, the 2010 revisions to the BC Building Code imposed much more stringent standards for ground motions for seismic design. The petitioners' lawyer took the position that the original reports met the current requirements under section 56 of the *Community Charter*, but the building inspector refused to issue the permit. Council upheld the decision of the building inspector upon reconsideration.

In court, the petitioners maintained their position that the 2003 geotechnical report formed the proper basis for issuing the building permit. However, the Court agreed with the City's position, finding that the covenant was directed to the issue of subdivision. Although the language of section 56 was broad enough to permit building inspectors to consider a pre-existing geotechnical report that was prepared for subdivision approval when they are exercising their discretion, the Court held that there was no suggestion in that language that they are required to do so. The Court also found that the building inspector had provided a compelling reason for seeking a current report (in the form of the change to the seismic standards in the *BC Building Code*) but ultimately the Court found that the building inspector would have been entitled to require a new report pursuant to section 56 simply to address the issues expressed in it, regardless of what material may have been generated at earlier stages of the development process.

The Court also rejected the petitioners' argument that the City had in essence contracted with or made promises to the petitioners' predecessors in title that construction on their lot could be carried out in accordance with the geotechnical reports provided when the 2003 covenant was entered into.

Finally, the Court made a number of findings in which it upheld the City's bylaws and policies respecting construction in hazardous areas.

The petition was dismissed.

Rachel Vallance

Lessons Learned from the Fort McMurray Fire

We are all well aware of the disastrous fire that swept through Fort McMurray starting May 1 of this year, declared to be under control on July 15. It was not just an Alberta issue, but an issue for all Canadians.

It has earned its nickname "The Beast" by destroying

- Approximately 1.5 million acres of forest.
- Approximately 2400 homes and buildings
- 665 work camps.

It is said to be the costliest disaster in Canadian history and involved the evacuation of 88,000 people.

It started as a 2-hectare fire and quickly spread for the same reason that all wildfires spread: high temperatures and strong winds. In 2 hours, it became a 60-hectare fire and in 2 days it encompassed 2500 hectares.

The chronology of events looks like this:

May 1	Fire starts. Goes from 2 hectares to 60 hectares
May 3	Fire enters Fort McMurray. Now at 2500 hectares.
May 4	State of Emergency Declared; evacuation ordered.
May 6	Order in Council passed setting up Recovery Task Force
May 9	Evacuation complete
June 3	Peak of fire and use of physical resources
July 15	Fire under control

On May 3, the fire entered Fort McMurray and on May 6, 2016, by order-in-council, the Premier created the ***Wood Buffalo Ministerial Recovery Task Force,*** consisting of Executive Council, reporting to cabinet, to advise on matters relating to the wildfire emergency and disaster in the Regional Municipality of Wood Buffalo.

The role of the Task Force was described to

> *(a) define, coordinate and lead, in collaboration with the Regional Municipality of Wood Buffalo and affected Indigenous communities, a comprehensive, long-term recovery strategy to respond to the impact of wildfires in the Regional Municipality of Wood Buffalo, guided by the following primary objectives*
>
> *(i) ensure public safety and security in the affected areas;*
>
> *(ii) support the overall physical, mental and social well-being of communities;*
>
> *(iii) timely and safe re-entry into communities*
>
> *(iv) resumption of municipal, economic and business activities.*

In short, it was similar to the establishment of a provisional government in the municipality, with the municipality's help and the help of the indigenous population.

At about this time, the Provincial Operations Centre (POC) was fully activated at the highest

level of emergency. This also required representation from all Government of Alberta ministries during the response phase.

On May 4, Premier Notley declared a provincial State of Emergency, with mandatory evacuation orders in place for Fort McMurray, Anzac, Gregoire Lake Estates, and the Fort McMurray First Nation. This was only the second time the province declared a State of Emergency; the first was during the southern Alberta flood in 2013.

Once a state of emergency is declared, civil liberties are suspended – which means from a legal point of view, the Charter is triggered. This rarely occurs, luckily, in our society but with the onset of climate change, it may become a reality.

Here is some further background on the municipality so that the reader can put things in perspective:

1. Fort McMurray is thought of as a town or city but it is, in fact, what is described as an "urban service area"[4] in RMWB, in northern Alberta. The Municipality is home to both rural and urban communities, with a population of more than 125,000 people. It has an unusual component in its population, -- that is, it is estimated that about 35 per cent of the region's population is a "shadow population" of temporary residents, who go in and out of the Wood Buffalo area for employment in the region's oil sands[5].
2. There are 6 First Nation communities, as well as Métis groups in the region. They make up about 10 per cent of the Regional Municipality of Wood Buffalo's population.
3. It is in northern Alberta so it is very remote and sometimes difficult to get to.
4. It is surrounded by arboreal forest.
5. It has only one highway which intersects it, going north-south. South to Edmonton (400 k) and North to Fort MacKay which is about 34 kilometres.

These are things we tend not to think of when looking at municipalities but each one of these elements played a role in the disaster.

As I had been in Fort Mac recently, I listened closely to the news reports. I left my office to go home – about a 10 minutes' drive – and heard on the news that the fire was under control. By the time I reached my house, the fire was declared to be out of control and massive evacuations were in being put in place.

At one point in the evacuation, inhabitants of Fort Mac were directed north to Fort Mackay because the fire had cut off the highway going south to Edmonton. Fort MacKay represents the end of the road –and is only about 34 kilometres from Fort McMurray. In other words, people were being directed towards a dead-end – with the distinct possibility that they would be trapped.

The government also reported as follows:

> *Thousands of evacuees took refuge at oil sands work camps, including camps run by Shell, Syncrude, Suncor Horizon North and Canadian Natural Resources Limited (CNRL). The Indigenous community of Fort McKay First Nation and Fort McMurray First Nation also opened their arms and welcomed many people seeking safety.*

As of May 6, the Provincial Task Force began a comprehensive review of the fire itself, the advance preparedness, and the measures taken in response.

[4] This is described as a specialized municipality in the Act, but is not defined.

[5] Fort McMurray is directly in the middle of the Athabasca oil sands – which explains its strategic importance in Alberta. But as we know, in 2014, the price of oil plummeted creating additional problems for the municipality

This is how the government described it:

> *Through the Task Force, the Government of Alberta is focusing on providing assistance to the Wood Buffalo region to support five pillars of recovery: people, economy, reconstruction, environment, and mitigation. The province is also building relationships with and acting as a connector between the Regional Municipality of Wood Buffalo, Indigenous communities, the Canadian Red Cross, industry, and the federal government. These partners will continue to collaborate and support one another to help make the region home again.*
>
> *Reports have been commissioned to identify lessons learned out of the response and early recovery efforts and to review the province's wildfire preparedness and response. Through this information, as well as through Alberta's FireSmart program, disaster preparedness and flood mitigation activities, the Government of Alberta will seek to further reduce the risk of disasters and emergencies in the Wood Buffalo area and all Alberta communities.*
>
> So reports have been commissioned, but we have not seen any yet.
>
> The FireSmart programme is described as being for "living with and managing for wildfire".
>
> *Preparing for the threat of wildfire is a shared responsibility. Community members, community leaders, forest companies, industry and government we all have responsibility to lessen the effects of wildfire. FireSmart uses preventative measures to reduce wildfire threat to Albertans and their communities while balancing the benefits of wildfire on the landscape.*

Some of the resources are described as follows:

FireSmart Documents

- FireSmart Guidebook for Community Protection– Feb 2013 (100 pages, 13 MB)
- FireSmart Guidebook for Oil and Gas Industry– 2008 (40 pages, 4 MB)
- FireSmart Homeowner's Assessment – FireSmart Begins at Home– Jun 2015 (5 pages, 2.5 MB)
- FireSmart Homeowner's Manual – FireSmart Begins at Home– Jun 2015 (15 pages, 9.1 MB)

FireSmart Community Grant Program

The FireSmart Community Grant Program is an initiative sponsored by Alberta Environment and Sustainable Resource Development. The program assists communities in reducing the risk of wildfire within their respective jurisdictions.

- FireSmart Community Grant Program
- Request a FireSmart Presentation
- Request FireSmart Materials

FireSmart Partnerships

The Alberta Government participates with organizations to achieve FireSmart objectives.

- Partners in Protection – FireSmart Canada
- Structure and Site Hazard Assessment
- Area Hazard Assessment

Canadian Association of Petroleum Producers

- Best Management Practices for Wildfire Prevention

On June 3, the number of firefighting resources peaked with approximately 2,197 wildland firefighters, 77 helicopters and 269 pieces of heavy equipment fighting the wildfire.

And after all of this, there is the gargantuan task of putting the pieces back together again. This is a whole different story.

So having been asked to comment on "lessons learned", they may be described as follows: [6]

1. There will be long-term environmental impacts. RMWB describes enhanced air, soil, and water monitoring to identify and track long-term impacts of the wildfire, including communities downstream from the impacted river systems, as well as any cumulative environmental effects

2. Ensure your Emergency Response Plan clearly sets forth, with exact steps necessary, the method to both

   a. Declare a State of Emergency, and,

   b. To exercise emergency powers.

   What happens in an emergency is that citizens' basic rights under the Charter are suspended. This is permitted as long as the Charter section 1 proportionality test is met.

3. Unless care is taken, a municipality caught in an emergency, who does what it pleases without regard to "reasonable limits prescribed by law", may negative statutory protections from liability. People who make real time decisions while an emergency or disaster is in progress, need to know the exact decision making process to follow to ensure so that in the event a citizen's rights are compromised, it is done in a manner that is truly prescribed by law.

4. Right from the time a State of Emergency is even being contemplated, the Director of Emergency Response needs to bring legal counsel into the picture immediately. If this is not done, they risk mistakes every step of the way, starting from the drafting of a State of Emergency, through to the public dissemination of that step, and, of course, all of the triage decisions along the way.

5. Nobody likes to think of what will happen months after the emergency has passed, but every little move gets scrutinized through 20/20 hindsight. The municipality can get sued for any conceivable breach of any legal duty that plaintiffs' counsel can imagine.

6. **In advance**, make sure that your Council passes one or more bylaws or resolutions to make clear that the level of preparedness for any foreseeable emergency, and the resources devoted to such preparedness, are **policy** decisions.

7. This, in turn, gives the municipality a fighting chance at getting on the right side of the policy/operational distinction that the SCC emphasized in that line of cases including **Laurentide Motels Ltd. *v.* Beauport (City), [1989] 1 SCR 705 , Just v. British Columbia, [1989] 2 SCR 1228**, and **Kamloops v. Nielsen [1984] 2 SCR 2.**

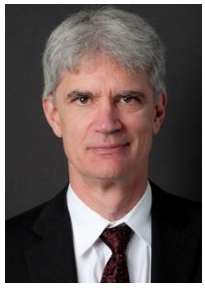
8. While none of these cases arose from emergency situations, counsel for insurers use them to assert that pre-fire decisions (where to deploy or not deploy standby firefighting equipment, or install fire hydrants) are ***operational*** decisions for which a municipality can be held liable, as

[6] Note that at the date of this article, the Province has not yet published any results.

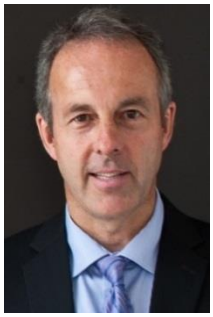
opposed to ***policy decisions*** for which a municipality are not liable.

Susan Trylinski

Lidstone & Company Lawyers



Paul Hildebrand is Associate Counsel at Lidstone & Company. Paul is the head of the law firm's Litigation Department. He won the Gold Medal in law at the University of British Columbia in 1980. Paul has a Doctorate in Economics in addition to his Law Degree and Master of Science degree in mathematics. For nearly 29 years, Paul Hildebrand has practiced law in the area of complex litigation, including a 12 year stint with McAlpine & Company, one of the leading complex litigation firms in Canada. Paul is responsible for the conduct of our local government clients' litigation matters, including defense of claims, insurance matters, suing other parties, injunctions, appeals, and other litigation related matters. He also has expertise in regard to arbitration, mediation and conciliation. He has done securities work, including financings for public and private companies, and real estate transactions.



Lindsay Parcells practices municipal law with a particular interest in land use, real property, corporate, commercial, mediation and environmental matters. Lindsay has 20 years of legal experience. He was called to the Alberta bar in 1992 and the British Columbia bar in 1995. Lindsay completed a Master's degree in Municipal Law from Osgoode Hall Law School in 2009 and a combined Bachelors of Laws and Masters of Business Administration degree from Dalhousie University in 1991. Before attending Law School, he served for one year as a legislative intern at the Alberta Provincial Legislature. Lindsay is currently Co- Chair of the Municipal Law Section of the BC Branch of the Canadian Bar Association.

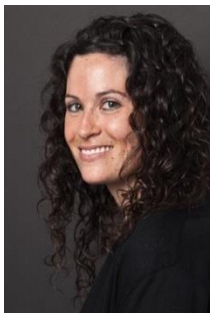
Rob Botterell focuses on major project negotiations for local governments (such as in relation to pipelines, LNG, dams and reservoirs, mines, oil and gas, and similar matters). He also deals with law drafting as well as local government matters in relation to aboriginal and resource law. Rob also advocates on behalf of local governments. Rob led a team that put together the Freedom of Information and Protection of Privacy legislation and advised on the Personal Property Security Act and others. He negotiated the key provisions of the Maa-nulth Treaty for Huu-ay-aht, has drafted over 500 pages of laws, and has negotiated with all levels of government and industry on major projects. He was a Trustee of the Islands Trust and in 2012 chaired a panel at the UBCM annual convention on "Voting on the Internet". Rob has an LL.B. from UVic and MBA from UBC, and is a Fellow of Institute of Canadian Bankers after having been the TD Bank Regional Comptroller in the 1980's. Rob has practiced law in British Columbia for 20 years.

Susan Trylinski is Associate Counsel at Lidstone and Company, located in Calgary, Alberta. While Susan has over 18 years of experience in municipal law, she first started her career in litigation at major Calgary law firms. She now primarily does board work (with related litigation to the Court of Queen's Bench and Court of Appeal) and advises on administrative law issues, municipal taxation, statutory interpretation and a variety of municipal law issues including enforcement, environmental

legislation, historical resources, duties of councillors and planning and development. Susan is also called as a solicitor in the state of New South Wales, Australia.

Maegen Giltrow practices in the areas of governance, bylaw drafting, environmental law and administrative law. She is also a well-known practitioner in the area of aboriginal law, and negotiated a treaty and worked on the Constitution, land use and registration laws and regulatory bylaws for a number of First Nations before she entered the practice of municipal law. Maegen clerked with the British Columbia Court of Appeal after graduating from Dalhousie Law School in 2003.

Don Lidstone Q.C. has practiced generally in the area of local government law since 1980. His municipal law focus is in the areas of constitutional, administrative, and environmental law, particularly in respect of governance, land use/sustainable development, regulatory approvals, and legislative drafting. Invited to speak regularly at conferences, symposia and universities, he has chaired the Sustainable Region Initiative (Governance and Finance), Liquid Waste Expert Review Panel, Fire Services Review Panel, Whistler Waste Blue Ribbon Panel, and the Municipal Law Section of the British Columbia Branch of the Canadian Bar Association. Don has published numerous papers and manuals and consulted on the development of the *Community Charter* and other municipal statutes in a number of provinces. He was designated Queen's Counsel in 2008.



Sara Dubinsky is a litigation lawyer and handles bylaw enforcement matters. She also provides legal opinions on a wide variety of issues, and is the go-to person in our firm for conflict of interest opinions. Sara is a graduate of the University of Victoria Faculty of Law. Sara summered with a boutique litigation firm in Vancouver and appeared at the Braidwood Commissions of Inquiry on behalf of the British Columbia Civil Liberties Association, where she articled. Sara received three awards in law school for her performance in the Wilson Moot Competition.

Marisa Cruickshank advises local governments in relation to a variety of matters, with an emphasis on labour and employment, constitutional, administrative and environmental law issues. Marisa completed her law degree at the University of Victoria. She was awarded five major scholarships and academic awards. She also served as a judicial law clerk in the British Columbia Court of Appeal.

Robin Phillips joined Lidstone and Company as an associate lawyer after completing a clerkship with five judges of the Supreme Court of British Columbia. She was called to the BC Bar in 2016. Robin received her J.D. from the University of British Columbia, where she was awarded several awards for academic excellence, including the Barbara Bluman Memorial Prize in Dispute Resolution and the Bruce McColl Memorial Prize in Alternate Dispute Resolution. Robin is also a mediator, having completed the court mediation program through Mediate BC.

Rachel Vallance provides legal opinions, agreements and bylaws on all local government matters. She completed her degree at the Unversity of Victoria, where she participated in the law co-op program. Rachel has woked at the Ontario Securities Commission in Toronto, The Ministry of Justice in Victoria, Chimo Community Services in Richmond, and Chandler & Thong-Ek, a business law firm with offices in Thailand and Myanmar. During law school, Rachel received awards both for academic performance and involvement in student affairs. Prior to her law degree, Rachel completed an Honours BSc in Psychology and Ethics, Society & Law at the University of Toronto.

LIDSTONE & COMPANY *acts primarily for local governments in BC and Alberta. The firm also acts for entities that serve special local government purposes, including local government authorities, boards, commissions, corporations, societies, or agencies, including police forces and library boards. Lidstone & Company has been selected by the Municipal Insurance Association of British Columbia to be the provider of its Casual Legal Services available to MIABC Casual Legal Services subscribers.*

Robert Sroka provides legal opinions and drafts agreements on all local government matters with an active interest in land use planning and real estate development. Robert came to Lidstone & Company from The City of Calgary Law Department, where he served as a bylaw prosecutor, drafted real estate transactions, and advised on planning issues. Robert obtained his JD from The University of British Columbia and spent two summers as an Ottawa intern in the offices of federal cabinet ministers. He is currently a PhD Candidate. His work on urban brownfield redevelopment financing has been presented at several law conferences.

Ian Moore is Lidstone & Company's articling student. He is a graduate of Queen's University's joint law-public administration program. While at Queen's he co-founded the student newspaper *Juris Diction* and sat on the executive committee of the Law Students' Society for two years. Prior to law school he lived in Edmonton and worked on a number of municipal initiatives, including the City of Edmonton's energy, food, and environmental strategies.